

IN THE UNITED STATES BANKRUPTCY COURT

**DO NOT PUBLISH**

FOR THE

SOUTHERN DISTRICT OF GEORGIA

Augusta Division

IN RE:	)	Chapter 13 Case
	)	Number <u>01-11243</u>
Thomas Johnson,	)	
	)	
Debtor	)	FILED
	)	2004 JAN 16 P 12:23
Thomas Johnson,	)	
	)	
Plaintiff	)	
	)	
v.	)	Adversary Proceeding
	)	Number <u>03-01184A</u>
	)	
Countrywide Home Loans and	)	
Washington Mutual Home Loans,	)	
	)	
Defendants.	)	

**REPORT AND RECOMMENDATION**

The United States District Court for the Southern District of Georgia referred this matter to this court retaining jurisdiction requiring the issuance of a report and recommendation by me. Neither this court nor the district court has subject matter jurisdiction and the case should be remanded to the Superior Court of Richmond County, Georgia.

The Plaintiff, Thomas Johnson, filed a complaint against the defendants, Countrywide Home Loans ("Countrywide") and Washington Mutual Home Loans ("Washington"), collectively "Defendants", in the Superior Court of Richmond County, Georgia, on November 11, 2002

(Civil Action File No. 2002RCCV-984). The Plaintiff subsequently filed a First Amended Complaint and Second Amended Complaint in the same case on April 21, 2003, and May 19, 2003, respectively. In both the First and Second Amended Complaints the Plaintiff raised class action allegations. All of the Plaintiff's contentions refer to actions taken by the Defendants after the Plaintiff, and all potential class members, were issued a bankruptcy discharge.

On June 6, 2003, in accordance with the federal removal statute, 28 U.S.C. §1446(b), Defendant Washington filed a Notice of Removal in the Superior Court of Richmond County, Georgia, and the United States District Court for the Southern District of Georgia, Augusta Division. Washington argued that the District Court had jurisdiction over the proceeding under 28 U.S.C. §1331 and §1334(b).<sup>1</sup> On June 26, 2003, the Plaintiff filed a Motion to Remand the case back to state court, claiming that the Defendants had waived their right to remove and that the District Court lacked jurisdiction pursuant to 28 U.S.C. §1334(b).

Both Defendants filed Responses In Opposition to Plaintiff's Motion to Remand, and the Plaintiff filed a reply. On July 31, 2003, the District Court issued an order referring this case to this

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<sup>1</sup>

28 U.S.C. §1331 states that district courts have original jurisdiction over civil actions arising under the Constitution, laws or treaties of the United States. Section 1334(b) of title 28 confers district courts jurisdiction over civil proceedings arising under title 11, or arising in or related to cases under title 11 United States Code (Bankruptcy Code).

bankruptcy court. The District Court held that because this may not be a core proceeding, the District Court would retain jurisdiction under 28 U.S.C. §157(c)(1). (District Court Order, July 31, 2001).

The bankruptcy court does not have jurisdiction over this case, and the referral to the bankruptcy court is not supported by 28 U.S.C. §157. Despite the Defendants' claims, this proceeding is not related to a case under title 11 of the United States Code.<sup>2</sup> The United States District Court for the Southern District of Georgia should therefore withdraw the referral of this case to the bankruptcy court and remand the case.

I. Neither the United States Bankruptcy Court nor District Court for the Southern District of Georgia has Jurisdiction Over this case under 28 U.S.C. §1334(b).

There are three possible types of bankruptcy jurisdiction vested in the district courts under 28 U.S.C. §1334(b).<sup>3</sup> When a district court has jurisdiction over a case under section 1334(b), the case can be referred to that district's bankruptcy court in accordance with 28 U.S.C. §157. When there is core, arising under Title 11 or arising in a case under Title 11 jurisdiction, bankruptcy judges may enter final orders and judgments. 28 U.S.C. §157(b)(1). However, if the bankruptcy court only has related to

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<sup>2</sup>Defendants do not allege district court jurisdiction as a "proceeding arising under Title 11" or "arising in . . . [a case] under Title 11" in §1334(b) because all of the Plaintiff's claims arise under state law and there is no pending bankruptcy case.

<sup>3</sup>The three types of original but not exclusive jurisdiction are: proceedings arising under title 11, arising in a case under title 11 or related to a case under title 11.

jurisdiction over a proceeding, then the bankruptcy judge can hear the proceeding but is limited to submitting proposed findings to the district court for review. 28 U.S.C. §157(c)(1). The district court retains jurisdiction over the case and reviews de novo any objection raised by the parties Id. The district court judge enters the final order or judgment. Id.

The Eleventh Circuit Court of Appeals has adopted a test for determining if related to jurisdiction exists. In Community Bank of Homestead v. Boone (In re: Boone), 52 F.3d 958 (11<sup>th</sup> Cir. 1995) ("Boone"), "[A] civil proceeding is related to bankruptcy...[if] the outcome of the proceeding could conceivably have an effect on the estate being administered in bankruptcy." Boone 52 F.3d at 960 (quoting In re: Lemco Gypsum, Inc., 910 F.2d 784,788 (11<sup>th</sup> Cir. 1990)). The court further narrowed this jurisdictional test. "An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate." Id. A case that has common issues of fact with a bankruptcy case does not automatically establish related to jurisdiction. "Overlap between the bankrupt's affairs and another dispute is insufficient unless its resolution also affects the bankrupt's estate." Hoc, Inc. v. McAllister (In re: McAllister), 216 B.R. 957 (Bankr. N.D. Ala. 1998).

The bankruptcy estate is the controlling element in the

determination of related to jurisdiction. In situations of sale or abandonment of property of the estate or discharge, the "bankruptcy court has jurisdiction over property owned by or in the actual or constructive possession of the debtor...[but] jurisdiction lapses when property leaves the estate" In re: Fedpak Systems, 80 F.3d 207, 214 (7<sup>th</sup> Cir. 1996) (internal citations omitted). "[J]urisdiction does not follow the property...[when it] leaves the estate." Elscint, Inc. v. First Wis. Fin. Corp. (In re: Xonics, Inc.), 813 F.2d 127, 131 (7<sup>th</sup> Cir. 1987). The Seventh Circuit points out that if jurisdiction did not lapse when property left the estate or when the estate ceased to exist because of discharge, "anyone who could trace his title to a bankrupt could invoke federal jurisdiction to settle disputes affecting that property." Id. Similarly,

Postconfirmation the only property of the estate remaining is the debtor's postconfirmation earnings used as payments pursuant to the plan. However, once the payment is made, that is tendered to the creditor pursuant to the plan, the payment is no longer property of the estate. The payment becomes property of the creditor. Whether the creditor properly applied the payment is purely a question of state law.

Telfair v. First Union Mortgage Corp. (In re: Telfair), 224 B.R. 243, 248 (Bankr. S.D. Ga. 1998), aff'd, 216 F.3d 1333 (11<sup>th</sup> Cir. 2000).

Under the Eleventh Circuit's test for related to jurisdiction, this court and the District Court has jurisdiction over the present case only if the outcome will have an effect on the

estate being administered in bankruptcy. The Plaintiff received a discharge on January 8, 2002. All property that was in the bankruptcy estate had been distributed to the creditors pursuant to the completed plan and any remaining estate property was returned to the debtor. The discharge removed all property from the jurisdiction of the bankruptcy court. Clearly, the Defendants cannot base jurisdiction on the possibility that the outcome of the case affects the administration of a now non-existent bankruptcy estate. There is no bankruptcy estate to be administered. The discharge has issued and all estate property has been administered or revested in the debtor.

It is true that the Defendants in this civil suit were creditors in the Plaintiff's bankruptcy case, and the Plaintiff's civil allegations involve property that was initially part of the bankruptcy estate. These similarities, however, are not enough to create related to jurisdiction. Despite the Defendants' argument that all of the Plaintiff's allegations as originating in his bankruptcy case, this suit is a separate controversy that cannot effect the bankruptcy estate. The Defendants' attempt to remove this case to federal court based on bankruptcy jurisdiction is precisely what the Seventh Circuit was concerned with in Elscent.

Defendants are invoking federal jurisdiction in order to avoid

litigation in state court raising a tenuous connection to a closed bankruptcy case.

This court dealt with a similar fact pattern and argument in American Geneneral Financial, Inc. v. McKnight (In re: McKnight), 136 B.R. 891 (Bank. S.D. Ga. 1992) ("McKnight"). In McKnight, the debtor's Chapter 13 plan was confirmed, and all property of the estate reverted in the debtor except the post petition earnings paid to the chapter 13 trustee. 136 B.R. at 892. A creditor from a post bankruptcy filing transaction attempted to bring suit against the debtor in bankruptcy court. Id. at 893. The bankruptcy court had no jurisdiction to hear the creditor's complaint because, while a bankruptcy estate existed, it only consisted of post petition earnings of the debtor that were devoted to the plan payments. Id. at 894. Whatever the outcome of the post petition creditor's suit against the debtor, the administration of the estate would not be affected. Id. Because the facts of the case did not meet the test articulated in Boone, I held that there was no jurisdiction in the bankruptcy court. Id. at 894-95. I further found that the creditor's only option was to pursue the debtor's post petition assets using state law remedies. Id. at 895.

The Defendants' position in this case is even more tenuous than in McKnight. Here, the Defendants argue that the District

Court has jurisdiction when there is no bankruptcy estate. Relying on the Eleventh Circuit's decision in Boone as well as 28 U.S.C. §157 and §1334 neither this court nor the District Court has jurisdiction to hear this case. I respectfully recommend that the District Court withdraw its referral and remand the case.

II. If the District Court Finds that this Court does have Jurisdiction then, in the Alternative, it is this Court's Report and Recommendation that the District Court Grant the Plaintiff's Motion to Remand.

If the District Court finds that it and through it this court has related to jurisdiction over this proceeding, then under 28 U.S.C. §157(c)(1), I am charged with submitting "proposed findings of fact and conclusions of law" to the District Court. It is therefore my report and recommendation to the District Court that the Plaintiff's Motion to Remand be granted.

The Plaintiff raises only state law claims in his Second Amended Complaint. It is solely the Defendants who claim that there are bankruptcy issues in the Complaint. The Defendants argue that the Plaintiff's main claim that he was charged inappropriate attorneys fees can only be decided using § 506(b) of the Bankruptcy Code.<sup>4</sup> The Defendants refer to Wezel v. Advocate Realty

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<sup>4</sup>Section 506(b) of the Bankruptcy Code states:  
To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than



Investments, Inc., 275 F.3d 1308 (11<sup>th</sup> Cir. 2001) for the argument that § 506(b) applies to attorneys fees, even if those fees are also enforceable under state law. Defendants' Memorandum In Opposition to Plaintiff's Motion to Remand, p. 13. However, this court previously dealt with this issue in a recent adversary proceeding in which Defendant Washington was a party.

Section 506(b) does not provide authority for a creditor to impose an obligation on a debtor to pay, i.e. the creation of debt. It merely provides the basis for determining that a nonbankruptcy law created obligation, in this instance the obligation to pay attorney's fees, is allowable as part of a secured or unsecured claim in the bankruptcy case.

In re: Clark v. Washington Mut. Home Loans (In re: Clark), 299 B.R. 694 (Bankr. S.D. Ga. 2003).

To reemphasize my holding in the above case: Section 506(b) does not authorize or create debt. That section of the Bankruptcy Code only determines how non-bankruptcy created debt is treated within the bankruptcy case. Additionally, section 506(b) is irrelevant here because there is no remaining bankruptcy case as of the filing of this complaint. As §506(b) has no relevance to this case and is the only substantive provisions of federal law invoked by Defendants, the District Court also lacks jurisdiction under 28 U.S.C. §1331.

Accordingly the referral to the bankruptcy court should be withdrawn and the District Court for the Southern District of

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the amount of such claim, there shall be allowed to the holder if such claim, interests on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

Georgia should GRANT the Plaintiff's Motion to Remand.

JOHN S. DALIS  
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 16th Day of January, 2004.